2014 IL App (2d) 130529-U
No. 2-13-0529
Order filed January 3, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BANK OF AMERICA, N.A., as successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CH-95
STEPHEN S. CORNELIUS and ELIZABETH A. CORNELIUS,	)	
Defendants-Appellants	)	
(Mortgage Electronic Registration Systems, The Master Operating Association of Providence, Unknown Owners, and Nonrecord Claimants, Defendants).	)	Honorable Leonard J. Wojtecki, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered a summary judgment of foreclosure (which we had jurisdiction to review, although the notice of appeal specified the confirmation of sale): defendants forfeited, for lack of citation to authority, their claim that plaintiff lacked standing, and plaintiff's motion for summary judgment did not rely on an affidavit that violated Rule 191.

¶ 2

¶ 3 Stephen S. and Elizabeth A. Cornelius, the property-owner defendants in this

foreclosure action filed by plaintiff (Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP), appeal after the court confirmed the judicial sale of the subject property. They assert that the court erred when it earlier ruled that plaintiff was entitled to summary judgment as to its right to foreclose. Plaintiff asserts that we lack jurisdiction because defendants' notice of appeal mentioned neither the summary judgment order nor the judgment of foreclosure. We hold that we have jurisdiction because the summary judgment was a step in the procedural progression that led to the confirmation and because the notice of appeal made clear that the relief sought was the reversal of the summary judgment. However, we also hold that defendants have failed to show that the court erred in granting summary judgment. We therefore affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff, on January 10, 2012, filed a foreclosure complaint concerning the property at 3085 Long Common Parkway in Elgin. Line 3(N) of the complaint stated, "Capacity in which Plaintiff brings this foreclosure: Plaintiff is the Mortgagee under 735 ILCS 5/15-1208." Attached to the complaint were the mortgage and note instruments. These named Countrywide Bank, FSB, as the lender; the note required defendants to make the required payments "to the order of the Lender." The note bears two endorsements. Both are stamped—including, by the appearance, the signatures. One is from Countrywide Bank, FSB, to Countrywide Home Loans, Inc., by "Laurie Meder Senior Vice President." The other is from Countrywide Home Loans, Inc., but with the "pay to the order of" line remaining blank. This bears the signature of Michele Sjolander, "Executive Vice President."

¶ 6 Defendants appeared through counsel and filed an answer and affirmative defenses. Among the assertions in the defenses were claims that plaintiff had not received a valid assignment of the note, that plaintiff did not possess the note, and that the endorsement in blank was invalid because the signature stamp had been used by a person without authority. In support of the claim that the endorsement was invalid, they attached a copy of a deposition that Sjolander gave in a federal case in Mississippi that had the same plaintiff. The deposition established that Sjolander had been a managing director at Countrywide with various supervisory responsibilities relating to mortgages; she supervised about 50 employees. When Countrywide merged into Bank of America, she stayed on. She supervised preservation of documents and had responsibility for security of vaults. The entity that managed the vaults also scanned documents; it was called Recontrust for much of the relevant period. Recontrust had the power of attorney of Sjolander and her predecessor for endorsing notes. Sjolander did not know which Recontrust employees exercised the power. Sjolander could enter Recontrust facilities only when performing an audit and only when accompanied by a Recontrust escort.

¶ 7 Plaintiff filed a combined motion to strike the affirmative defenses and for summary judgment. In the motion to strike, it asserted that defendants had failed to meet their burden of pleading lack of standing. It further asserted that it was the holder of the note and would produce the original in open court. (A later order states that it did so.)

¶ 8 Exhibit A to the motion was a copy of the note apparently identical to that appended to the complaint.

¶ 9 Defendants failed to file a timely response, but sought to file a late response. They

asserted that the procedure described by Sjolander in the deposition could not generate effective endorsements.

¶ 10 The court "str[uck] the affirmative defenses with prejudice." On November 8, 2012, it granted summary judgment against defendants. The court entered a judgment of foreclosure the same day, with a judgment amount of $471,727.08. The order did not contain a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) of immediate appealability. The judicial sale took place on April 11, 2013; the winning bid was plaintiff's $300,000. The court confirmed the sale on April 22, 2013.

¶ 11 Defendants filed a notice of appeal within 30 days of April 22, 2013. This notice stated that defendants were appealing from the "orders" of April 22, 2013—it treated the order of possession as separate—and sought "remand *** with directions to reinstate all counts of the complaint for trial on the merits as to all claims."

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendants assert that "[t]he issues of the validity of the indorsement [*sic*] [and] the indorsment's [*sic*]fraudulent nature *** present genuine issues of material fact or errors of law that would require reversal of the circuit court's entry of summary judgment." They state that "[e]vidence of forgery or invalidity of a signature [endorsing a note] precludes a claim enforcement of as a holder in due course."

¶ 14 They also assert that "the [Illinois Supreme Court Rule 191 (eff. July 1, 2002) affidavit] attached to the [summary judgment] motion *** was insufficient as a matter of law." "[T]he Affidavit supplied with the Motion *** claimed it relied upon the promissory Note" but plaintiff did not attach the note to the affidavit. Moreover, the affidavit improperly

contained conclusions of law: it stated that defendants had "defaulted" and that plaintiff "held" the note. Defendants also assert the existence of other defects.

¶ 15 Plaintiff has responded to defendants' arguments. However, it also asserts that this court lacks jurisdiction to review the summary judgment because the notice of appeal states that the appeal is from the "orders" of April 22, 2013, and not the foreclosure judgment or summary judgment order.

¶ 16 We first consider whether we have jurisdiction to give defendants the relief they seek. We conclude that the summary judgment order is reviewable as an order "that *** was a step in the procedural progression leading to the judgment which was specified in the notice of appeal. [Citation.]" (Internal quotation marks omitted.) *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 23. Moreover, an order is reviewable if the "notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal." *Borchers v. Franciscan Tertiary Province of Sacred Heart, Inc.*, 2011 IL App (2d) 101257, ¶ 37 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433-34 (1979)). Given that the notice of appeal requested that we "reinstate all counts of the complaint for trial on the merits as to all claims," the notice left no doubt that defendants sought review of the summary judgment. We acknowledge that the foreclosure judgment that directly resulted from the summary judgment order was a final judgment, in the sense that a finding pursuant to Rule 304(a) could have made it immediately appealable (see, *e.g.*, *Washington Mutual Bank, F.A. v. Archer Bank*, 385 Ill. App. 3d 427, 432, n. 1 (2008)). Thus, defendants could have greatly enhanced the clarity of the notice by specifying in the notice that they were challenging the

foreclosure judgment and the predicate summary judgment order. Nevertheless, given that we must construe notices of appeal liberally, and that the notice was clear enough that plaintiff must have known the subject of the appeal (see *Borchers*, 2011 IL App (2d) 101257, ¶ 37), we conclude that we may review the summary judgment.

¶ 17 However, we also conclude that both of defendants' arguments against the summary judgment fail. We consider them in order.

¶ 18 First, defendants have completely failed to support their argument that a genuine issue of material fact existed as to plaintiff's standing, in that they have failed to cite any authority to support their central premise that one or both of the note's endorsements were unauthorized or fraudulent. A reviewing court is entitled to have the appellant present it "with clearly defined issues, citations to pertinent authority and cohesive arguments"; the appellant cannot expect the court to make the argument for him or her. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶10; see also Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[a]rgument, *** shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities"). Arguments unsupported by citation of proper authority are forfeited. *E.g.*, *Nelson v. County of Kendall*, 2013 IL App (2d) 120635, ¶ 9. Here, defendants have not provided any authority to support their assertion that the circumstances of the endorsements were indicative of fraud or invalidity. Defendants' core premise is thus without proper support, and without that premise the argument fails.

¶ 19 Defendants second argument, that the "the [Illinois Supreme Court Rule 191 affidavit] attached to the motion under [section] 2-1005 was insufficient as a matter of law" also fails. The argument has two notable defects.

¶ 20 First, the motion did not rely on an affidavit. Plaintiff filed the motion on July 19, 2012; the motion's only exhibit is a copy of the note. The only affidavit plaintiff filed that matches the description implied by defendants' brief is one filed on October 23, 2012. That affidavit immediately follows plaintiff's "Certificate of Prove-Up of Attorney Fees and Costs" in the record. It thus appears that plaintiff used that affidavit to prove its damages, and not to support its motion for summary judgment. We thus doubt the relevance here of Rule 191—which applies only to affidavits in support of motions for summary judgment under section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2012)), motions for involuntary dismissal under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)), and motions to contest jurisdiction over the person under section 2-301 of the Code (735 ILCS 5/2-103 (West 2012)). Ill. S. Ct. R. 191 (eff. July 1, 2002).

¶ 21 Second, the defects of which defendants complain are either nonexistent or trivial. Defendants claim that "the Affidavit mentioned that the affiant relied on the business records of [plaintiff], yet it did not include a list of the records relied upon." However, the affidavit included an exhibit that consisted of a seven-page printout of plaintiff's records relating to defendants' account. It is hard to imagine what else plaintiff could have provided—defendants cannot have wanted plaintiff's entire database, nor would a listing of the database's file structure have been reasonable. Defendants assert that the affidavit was improperly conclusory in that it stated that defendants had "defaulted" and that plaintiff "held" the note. This objection elevates form over substance: the affidavit could equally well have been worded to state that defendants had "failed to make monthly payments" and that plaintiff "was in possession of the original note." Also of no substance is defendants'

objection that the affiant relied on the note but did not include it as an exhibit. The affidavit relied on the note only to get the applicable interest rate to calculate the *per diem* accrual of interest. But defendants never challenged the *terms* of the note, which was incorporated in the complaint, so we can see no objection to use of its interest-rate term.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the confirmation of the judicial sale.

¶ 24 Affirmed.